No. 1517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

UNION PACIFIC RAILROAD COMPANY, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

On Appeal from the United States
District Court for the District of Nebraska

JURISDICTIONAL STATEMENT

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August, 1960.

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JURISDICTIONAL STATEMENT

Appellants' appeal from the judgment of the United States District Court for the District of Nebraska dismissing their complaint to set aside an order of the Interstate Commerce Commission prescribing new rates for the use of freight cars.

Union Pacific Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington and Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Colorado and Southern Railway Company; The Denver and Rio Grande Western Railroad Company; Fort Worth and Denver Railway Company; Great Northern Railway Company; Louisville and Nashville Railroad Company; Missouri Pacific Railroad Company; Norfolk and Western Railway Company; Northern Pacific Railway Company; Southern Pacific Company; St. Louis San Francisco Railway Company; Seaboard Coast Line Railroad Company; Soo Line Railroad Company; The Texas and Pacific Railway Company; Western Maryland Railway Company; The Western Pacific Railroad Company

OPINIONS BELOW

The judgment and opinions of the district court are not yet reported. The judgment signed by two of the three judges is set forth in Appendix A (App., p. 1a).* The Memorandum Opinion of Judge Robinson is set forth in Appendix B (App., p. 2a). Judge Lay's separate concurring opinion is set forth in Appendix C (App., p. 32a), and Judge Van Pelt's dissenting opinion is set forth in Appendix D (App., p. 34a).

The report and order of the Interstate Commerce Commission, published at 332 I.C.C. 176, is set forth in Appendix E (App., p. 39a). Subsequent orders of the Commission postponing the effective date of its order and then setting an effective date of August 1, 1969, appear as Appendices F (App., p. 143a), G (App., 145a) and H (App., p. 147a), respectively. The district court's order of July 7, 1969, enjoining enforcement of the Commission's order pending this appeal appears as Appendix I (App., p. 149a).

JURISDICTION

The judgment of the three judge district court is dated May 27, 1969 (App. A, p. 1a). These appellants filed their notice of appeal in the district court on June 24, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253, 2325, 2101(b). *Baltimore & Ohio R. Co. v. Aberdeen & R. R. Co.*, 393 U.S. 87 (1968); *Penn Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968).

* Appendices A through I are separately bound as a Joint Appendix to the Jurisdictional Statements of both groups of Appellants – Arizona Corporation Commission et al. and Union Pacific Railroad Company, et al.

QUESTIONS PRESENTED

The Interstate Commerce Commission prescribed new rates for the use of freight cars pursuant to Section 1(14)(a) of the Interstate Commerce Act which provides that, in fixing "compensation for the use of any type of freight car," the Commission "shall give consideration to . . . factors affecting the adequacy of the national freight car supply," and that the Commission "shall, on the basis of such consideration, determine" the proper freight car rental. The question presented is whether the Commission violated Section 1(14)(a) when it prescribed new rates for the use of freight cars but refused to consider, as irrelevant, evidence showing that the new rates would have a seriously adverse effect on the national freight car supply.

A separate question presented is whether the provisions of the Administrative Procedure Act requiring reasoned findings based on substantial evidence were violated by the Commission in its determination of the rate of return to car owning railroads on their investment in freight cars.

STATUTES INVOLVED

The statute of primary concern in this appeal is Section 1(14)(a) of the Interstate Commerce Act, [49 U.S.C. § 1(14)(a)]. Other statutory sections involved are the National Transportation Policy [49 U.S.C. preceding Section 1] and Sections 8(b) and 10(e) of the Administrative Procedure Act [codified as 5 U.S.C. § ... (b) and ...(e)]. These statutory provisions are set forth in the Statutory Appendix hereto [infra, p. 21, et seq.].

STATEMENT

Background

In the early years of rail transportation in the United States, individual railroads owned the freight cars they used to serve their shippers, and when freight moved over

1966. Section 1(14)(a), which authorizes the Commission to fix compensation for the use of railroad equipment, was thus amended to provide:

> "In fixing such compensation to be paid for the use of any type of freight car, the Commission *shall* give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national car supply. . . ." (Emphasis supplied.)

Section 1(14)(a) as amended further provides that the Commission

> "*shall, on the basis of such consideration,* determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." (Emphasis supplied.)

The 1966 amendment to Section 1(14)(a) thus superimposed on existing Commission authority (as defined in the *Palmer* case) the power to increase compensation for the use of freight cars to a level in excess of ownership costs by adding an "incentive element." The amendment also made it explicit and mandatory that car supply factors be given consideration by the Commission in any case in which it fixes compensation for the use of freight cars.

The Proceedings Before the Commission.

At the time the 1966 amendment of Section 1(14)(a) became effective, a proceeding was pending before the Commission for determination of the compensation to be paid for the use of freight cars. That proceeding grew out of a

dispute that had arisen when several small railroads refused to pay the per diem rates agreed upon by the industry acting through the Association of American Railroads (AAR). In 1955 the Commission issued a declaratory ruling (Docket No. 31358) that the AAR rates were not in excess of reasonable compensation. *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291 (1955). That ruling was set aside by a three-judge court in the District of Massachusetts on the ground that the Commission had not adequately considered a proposal of one of the small railroads that there be a separate per diem rate for each railroad to reflect the different mileages run by the individual railroads. *Boston & Maine R. Co.* v. *United States*, 162 F.Supp. 289, 297 (D.Mass. 1958), *appeal dismissed*, 358 U.S. 68 (1958).

On remand of the case to the Commission, the prior adversary proceeding was reopened and, in addition, a new proceeding under Section 1(14)(a) was instituted by the Commission on its own motion for the purpose of prescribing the compensation to be paid throughout the entire industry for the rental of freight cars (Docket No. 33145). All railroads were made party to this new proceeding, including appellants herein.

At the hearings, the Commission's staff proposed that compensation for the use of freight cars no longer be based solely on a daily charge, but that compensation be based partly upon a reduced daily charge and partly upon a mileage charge. In response to this proposed time-mileage system, a number of witnesses testified as to the adverse effect that such a system would have upon freight car supply.[3] For example, Witness Baumgartner, Superintend-

[3] *E.g.*, Exhibit R-120, pp. 5-7 (Witness Baumgartner); Exhibit R-98, p. 13 (Witness Budd); Exhibit R-146, p. 7 (Witness Monroe); Exhibit R-119, p. 14 (Witness Brown); Exhibit R-184, pp. 10, 17 (Witness Hamilton); Exhibit R-54 (AAR Circular).

ent of Transportation of the Santa Fe, testified as follows (Exhibit R-120, pp. 5-7):

> "[T]he adoption of a system of rates based upon separate time and mileage factors would be a backward step from the standpoint of efficiency in utilization of the available car supply. Under the time-mileage system the user would pay a lower rate when the car was sitting still than when it was moving, and therefore the car could be held for prospective loading or could be handled at 'carrier's convenience' through terminals and junctions at a lower basis of rental than would be applicable under a rental system based upon time alone, and when the time-mileage system is incorporated into a schedule of rates graduated on value, the situation is particularly aggravated in the lower value brackets, where most of the present fleet of general purpose cars fall."
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> "The other side of the coin is that the separation of rental into time and mileage factors tends to penalize the carrier that is trying to handle cars efficiently by making as many miles per day as possible. Whereas the carrier which lets a car in the $1,000-$5,000 bracket sit idle might pay only $1.46 as the daily rental, the carrier that ran the car 300 miles in a day would pay $1.46 plus an additional $6.84 as the mileage factor. In my opinion such a premium on keeping a car idle and such a penalty on producing high mileage is a step in the wrong direction in fixing freight car rental."

The Commission's failure and refusal to consider such uncontroverted evidence, on the theory that it was irrelevant, gives rise to the primary issue in this case.

The Order of the Commission.

On January 17, 1968, over a year and a half after enactment of the amendment to Section 1(14)(a), the Commission prescribed a new structure of car rental rates effective

October 1, 1968.[4] Instead of a single rate per day for a given freight car, the Commission's order would require that the rate be calculated by adding (1) a rate per day and (2) a rate per mile times the number of miles run by that car (332 I.C.C. at 231; App. E, p. 94a). The result of the Commission's order would be to reduce substantially the amount a car-using railroad would be required to pay to hold a car idle. Under the rate structure presently in effect, for example, the per diem rate for a $12,500 freight car is $4.50 (332 I.C.C. at 185; App. E, p. 48a). The Commission's order would reduce the daily charge to $3.49 (332 I.C.C. at 242; App. E, p. 105a). At the same time, the separate mileage rate would deter a railroad from maximizing the mileage run by a freight car.

In reaching this result, the Commission expressly refused to consider the evidence of record showing the adverse impact the prescribed time-mileage rates would have on car supply, holding that such considerations, "however beneficial," were not applicable to "the determination of the rates in this case" (332 I.C.C. at 223; App. E, p. 86a). Under the Commission's reading of Section 1(14)(a), this evidence was irrelevant because the Commission's powers were limited in this proceeding "to determining compensation (*basic* per diem) based strictly upon cost considerations" (332 I.C.C. at 257; App. E, p. 120a). The Commission further stated (*Ibid.*):

> "While the incentive provisions are not involved in the instant proceedings and cannot be considered on this record, in other proceedings currently pending at various stages of administrative process, the Commission is moving toward determination of whether or not incentive rates should be established and the attendant question of modification of our present car service rules."

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[4] The effective date was later extended to August 1, 1969, and, except for record-keeping provisions, has been stayed pending this appeal (App. F through I).

The "other proceedings" referred to by the Commission as dealing with the question of "whether or not incentive rates should be established" was the incentive per diem case, *Ex Parte 252*. The sole issue in *Ex Parte 252* was whether the existing per diem rates should be increased by $2.50 per day or some other amount. At no stage of that proceeding was there brought in issue or considered by the Commission the question of the effect on the national car supply of substituting a time-mileage system of compensation for the existing per diem basis. In the Commission's first report in that investigation, the proceeding was discontinued because adequate information necessary to decide upon an increase in existing per diem rates was not available. *Incentive Per Diem Charges,* 332 I.C.C. 11, 12, 16 (1967). The Commission thereafter instituted another proceeding *Ex Parte 252 (Sub No. 1)*, directed exclusively to the question of whether an "incentive element" should be added to freight car rental rates, and undertook to assemble additional data. No hearings have as yet been held in that proceeding.

Thus, neither in the *Per Diem* proceedings which resulted in the order now in question, nor in the *Ex Parte 252* proceedings, has the Commission given any consideration at all to the evidence showing that abandonment of a per diem basis and the substitution of a time-mileage system of car rentals would have a seriously adverse impact on the national car supply.

The Decision of the Three-Judge Court.

On May 27, 1969, the three-judge court below handed down three separate opinions. The opinion of District Judge Robinson (App. B, p. 2a), while acknowledging that the Commission had refused to consider car supply factors in this case, held that the evidence showing the adverse impact of the prescribed time-mileage rates on car supply was irrelevant as a matter of law (App. B, p. 14a):

> "The plaintiff railroads vigorously contend that under the statute as amended the Commission cannot lawfully refuse to give consideration to car supply factors when it enters an order prescribing the compensatory per diem for the use of freight cars. We do not read the statutory language as providing such a requirement. . . ."

Judge Robinson accepted the Commission's theory that determination of rates for the use of freight cars could be separated into two kinds of proceedings, one to consider solely the elements of ownership expenses (so-called basic per diem) and the other to consider whether an incentive element should be added (incentive per diem). Under this theory, consideration of factors affecting the national car supply are relevant in the incentive per diem proceedings, but: "Car supply factors have no relevance to the computation of [basic] per diem" (App. B, p. 25a). On this theory, Judge Robinson concluded "that the Commission properly rejected a consideration of car supply factors in the computation of basic per diem" (App. B, p. 26a).

Circuit Judge Lay, concurring in the judgment (App. C, pp. 32a-33a), was unable to rationalize the Commission's refusal to consider the impact of the time-mileage system on car supply (App. C, p. 32a):

> "The literal interpretation of Section 1(14)(a) of the Interstate Commerce Act (49 U.S.C. § 1(14)(a)) seems to require the Commission to consider the incentive rates along with the per diem rates and simultaneously in the same proceeding to make a deliberate choice between the two, based upon car supply factors. I have difficulty in rationalizing that the Commission has in fact made a deliberate choice as directed."

Judge Lay nevertheless held that the Commission had "substantially complied" with the 1966 amendment of Section 1(14)(a), even though there would be a time lag between

the effective date of the time-mileage order and any action taken by the Commission in the pending incentive proceeding *(Ex Parte 252 (Sub No. 1))*, because he believed that the time lag would not be a long one (App. C, p. 33a):

> "I conclude that the Commission must act, as soon as practicable, to set incentive rates on the basis of inadequacy of car supply. It has the affirmative duty to do so."

The dissenting opinion of District Judge Van Pelt (App. D, pp. 34a-36a) concluded that the Commission's action violated the provisions of Section 1(14)(a) (App. D, p. 35a):

> "Under the Commission order now affirmed by my colleagues, a rate is promulgated which admittedly has been established without consideration of the factors which the Congress said shall be considered. . . . Congress, in view of the car shortage and the Commission's inaction, was within its rights in using the mandatory 'shall' and in attempting to prevent the Commission from doing what it now proposes to do, namely, start another proceeding, with endless hearings and examinations, by requiring that its action be taken in the same proceeding in which it 'fixes compensation.' I feel this court should insist that the mandate of the Congress be carried out now."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The Commission's refusal to consider evidence showing that adoption of a time-mileage basis of freight car rentals would have a serious impact upon the nation's supply of freight cars constitutes a plain violation of the statute.

The 1966 amendment to Section 1(14)(a) directs that, in any proceeding in which the Commission fixes the "compensation to be paid for the use" of freight cars, "the Commission *shall* give consideration . . . to factors affecting the

adequacy of the national car supply and *shall, on the basis of such consideration,*" determine freight car rental rates. (Emphasis supplied.)

The order of the Commission at issue in this appeal fixes the compensation to be paid for the use of freight cars. But the Commission did not give consideration to car supply factors as required by statute. The Commission prescribed a time-mileage system of freight car rental rates, not on the basis of consideration of the effect such a system of rates would have on the nation's freight car supply, but in complete disregard of the effect of its order on car supply. The evidence of record showing the adverse impact which the time-mileage system would have on car supply was not considered at all but was cast aside as irrelevant.

The issue before this Court does not involve any question as to the judgment or discretion of a regulatory agency. In this case, it has been conceded by the Commission in its report and by the court below that the Commission has not exercised any judgment with respect to the impact the prescribed time-mileage rates would have on car supply. Consideration of all such evidence having been refused on the theory that it was irrelevant, this appeal presents not a question of administrative discretion but the question of whether the Commission properly construed the 1966 amendment to Section 1(14)(a) as permitting it to fix compensation for the use of freight cars while refusing to consider, as irrelevant, evidence showing that the prescribed time-mileage system would adversely affect the national freight car supply. As this Court held in *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261, 272 (1968):

> "The issue in this case, however, relates not to the sufficiency of evidence but to the construction of a statute. The construction put on a statute by the agency

> charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291. 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia. . . .' *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318."

The Commission's theory, approved explicitly by one judge and implicitly by another judge concurring in dismissal of the complaint, is that the Commission can separate its determination of compensation for the use of freight cars into two stages, "basic per diem" and "incentive per diem." But the fundamental statutory question does not concern the manner or procedure by which the Commission hears and determines the compensation to be paid for the use of freight cars. The question raised by this appeal is whether the statute permits the Commission to prescribe and make immediately effective a new method of compensation for the use of freight cars in the absence of any consideration by the Commission, in any proceeding, of the impact that such a new time-mileage system would have on the national car supply. Under the construction of the statute adopted by the Commission and sustained by the divided Court below, the entire subject of the impact on car supply of the time-mileage system falls between two chairs: it is held irrelevant in this "basic" per diem case, and it was not at issue and was not considered in the "incentive" per diem case.

Under the pre-existing law, the Commission was authorized to consider, and did consider, the effect on car supply of rates for the use of freight cars computed wholly on a daily basis rather than on a mileage basis (*Palmer, supra* pp. 5-6). Such a construction of the statute prior to the 1966 amendment was fully in accord with the National Transportation Policy in which Congress directed that all provisions of the Interstate Commerce Act be administered so as "to promote . . . efficient service and foster sound economic conditions in transportation" (49 U.S.C. preceding § 1). The 1966 amendment *added* to the powers of the Commission and explicitly directed that "the Commission shall give consideration to . . . factors affecting the adequacy of the national car supply" in any case in which the Commission fixes the compensation to be paid for the use of freight cars.

The whole purpose of the 1966 amendment was "to secure alleviation of the recurring national shortages of railroad freight cars" by authorizing increases in the daily charge. (House Report, *supra,* pp. 6-7.)[5] Yet, the Commission's

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[5] The entire discussion in Judge Robinson's opinion demonstrating that Congress enacted the House bill and not the Senate bill (App. B, pp. 15a-19a) is beside the point. Appellants rely on the bill reported by the House Committee and enacted by the Congress, and do not rely on the different language of the Senate bill. In fact, both the House and Senate were motivated by the same basic purpose to *increase* the Commission powers to prescribe *higher* per diem rates by eliminating the restrictions found in the *Palmer* case. House Committee Chairman Staggers stated that there was no difference in "philosophy" between the House and Senate bills (112 Cong. Rec. 10,452 (1966)). And, when the House version of the bill was presented to the Senate for final enactment, Senate Committee Chairman Magnuson advised the Senate that "while the House amendments change the language of the bill in a number of respects, the House and Senate versions of S. 1098 are substantially the same" (112 Cong. Rec. 10,755 (1966)).

order would reduce the daily charge for the use of freight cars in the face of this Congressional purpose. And the Commission has done this while treating as irrelevant the effect of its action on car supply despite express statutory language requiring that "the Commission shall give consideration . . . to factors affecting the adequacy of the national car supply." Thus, the decisions of the Commission and the court below are not only contrary to the express terms and manifest purpose of the 1966 amendment to Section 1(14)(a) to improve car supply, but in giving the amendment an interpretation which is 180 degrees at odds with its terms and purpose, they would make the car supply problem worse.

The statutory question presented by this appeal is not only substantial as a legal issue but is vitally important to the railroad industry and the national economy. The serious freight car shortages cited by the Congressional reports in 1966 have become even more severe. An order of the Commission which, according to the uncontroverted evidence, would further aggravate the national freight car shortage should not be permitted to become effective without the substantial statutory issue presented by this appeal receiving plenary review by this Court.

2. A separate issue is presented by the Commission's determination of the rate of return factor used in calculating the annual cost of owning freight cars.

The Commission's approach was to split the property base of the national car fleet into two segments, one representing the capital invested directly by the car owners and the other representing the amount secured through debt financing. Then the Commission applied separate rates of return to each segment of the property base, one representing the cost of equity capital and the other the cost of debt.

The net effect of these calculations was to allow car owners a return on their investment in freight cars of less than 4 percent after taxes (6 percent before taxes) (332 I.C.C. at 213, 268; App. E, pp. 76a, 131a). Such a return is plainly inadequate where the interest rate on debt alone exceeded 6 percent at the time the record was made, and now exceeds 8 percent.

Appellants showed in the court below that the Commission's conclusions with respect to rate of return were not supported by any evidence (the Commission having used a method of calculation which neither the parties nor the Commission's staff had considered and as to which no evidence was adduced at the hearings). The Commission itself stated with respect to the rate of return on equity capital that "no evidence is of record on this point" (332 I.C.C. at 212; App. E, p. 75a). Judge Robinson's opinion disposes of this point by stating: "Such a matter is within the Commission's discretion" (App. B, p. 30a).

Administrative discretion may be exercised on the basis of evidence, but discretion cannot be substituted for evidence. *Baltimore & Ohio R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968). Sections 8(b) and 10(e) of the Administrative Procedure Act require that administrative determinations be supported by reasoned findings based upon substantial evidence. 5 U.S.C. §§ 557(c), 706. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168 (1962). Enforcement of these legal standards is especially important in this case where the result of the Commission's determination of rate of return is to produce unduly low freight car rental rates at a time of serious freight car shortages.

CONCLUSION

For the foregoing reasons, this appeal presents substantial questions in the interpretation and administration of the Interstate Commerce Act. Probable jurisdiction should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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Statutory Appendix

Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), provides as follows:

> "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest."

The National Transportation Policy, 49 U.S.C. preceding Section 1, provides as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and faster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 8(b) of the Administrative Procedure Act, formerly 5 U.S.C. § 1007(b) and now revised and codified as 5 U.S.C. § 557(c) (80 Stat. 387), provides:

> "Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
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> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

Section 10(e) of the Administrative Procedure Act, formerly 5 U.S.C. § 1009(e), and now revised and codified as 5 U.S.C. § 706 (80 Stat. 393), provides:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."